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Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

HOBERT PARKER, Jr., Petitioner

VS.

UNITED STATES AIR FORCE AND
UNITED STATES OF AMERICA, Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE

NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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24pp

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QUESTIONS PRESENTED

1. Whether Due Process is constitutionally required after the issuance of a barment order from a military installation which contains "regular allegations", punishable by imprisonment, which impose a badge of infamy on the accused person.

2. Whether the First Amendment protects speech during a private telephone conversation that was not perceived as threatening by the sole-direct witness.

3. Whether barment orders from military installations are required to comply with:

A--18 U.S.C., Section 1001 (prohibits false official statements).

B--Applicable military regulations (e.g. Air Force Instruction 31-209, chap. 2, para. 2.8, "Barment orders should be in writing and contain sufficient details to support prosecution by civilian authorities.")

C--The Administrative Procedures Act, 5 U.S.C., Sections 700-706 (agency action must be based on facts or substantial evidence).

4. Whether the Court will require that the actions and statements of military authorities before the issuance of a barment order--and any EXCEPTION within the barment order itself--are to be consistent with their allegation within a barment order that the accused person is considered to be a threat to the maintenance of good order and discipline on a military installation.

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LIST OF PARTIES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below from the Ninth Circuit Court of Appeals.

IX

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix **A** to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix **B** to the petition and is unpublished.

X

JURISDICTION

The date on which the United States Court of Appeals decided Petitioner's case was March 23, 1999.

A timely petition for rehearing was denied by the United States Court of Appeals on July 22, 1999, and a copy of the order denying rehearing appears at Appendix **D.**

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

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STATEMENT OF THE CASE

1. On November 3, 1993, the Vandenberg Air Force Base ("VAFB") Chief of Security Police Investigations, a Master Sergeant, issued and authenticated a pick up order for the Petitioner, Hobert Parker, Jr., a civilian. The pick up order was issued despite being specifically prohibited by Air Force Instruction 31-201, chap. 6, para. 6.2.2 ("military authorities may not investigate or arrest persons [i.e. civilians] not subject to the UCMJ [Uniform Code of Military Justice].") The pick up order was in response to a telephoned report or complaint received from a hearsay

witness. This pickup order was, also, issued in spite of the requirement of Air Force Instruction 31-201, chap. 8, para. 8.2.1, which states: "Security police will obtain the installation commander's (or appointed military magistrate's) permission to conduct a probable-cause search." Despite a Freedom of Information Act Request, dated March 6, 1995, the Petitioner has not been provided with any written evidence that prior permission to search was obtained.

2. The basis for the pick up order was: "TRESPASSING/COMMUNICATING A THREAT & UNAUTHORIZED POSSESSION OF VAFB ID PASSES."

3. The true facts related to the alleged causes for the Petitioner's arrest were:

A. TRESPASSING--The non-secured, area where the Petitioner was allegedly trespassing was wide-open to the public. Base-entry passes were not required for this non-secured area. For people to obtain a base-entry pass for an initial entrance into the secured area it was necessary to enter this non-secured area. There were not any "no trespassing" signs in this non-secured area. However, there was a very-visible sign directing visitors to park in a specific parking lot where the Petitioner had parked on several different days. Before the issuance of the pick up order the Petitioner was never ordered to vacate this non-secured area while peacefully standing there, for short periods of time, on several different days. (**Trespasser**: A person who enters on the property of another without any right, lawful authority or an express or implied invitation or license. Black's Law Dictionary, Fifth Edition, 1979) Therefore, the above facts do not constitute trespass. (See District Court Clerk's Record 38, at page 5, paragraphs 25-31.)

B. COMMUNICATING A THREAT--The sole-direct witness received inadequate questioning by the Security Police Investigator. The Petitioner subsequently signed a declaration (see District Court Clerk's Record 38, at page 9, paragraphs 46-48) which quotes the sole-direct witness, "I did not perceive a threat. If I had been asked why I didn't initiate a report to the Security Police my answer would have been that I wasn't bothered by our telephone conversation and didn't believe it was necessary to make a report to the Security Police. Or something to that effect." (Emphasis added.). (The Air Force's response to Interrogatory no. 11 [see District Court Clerk's Record 33, at pages 27-30] was that the Air Force has no information with which to respond to questioning about the perception of the sole-direct witness in relation to an alleged threat.) The hearsay witness telephoned the Security Police 18 days after the Petitioner's telephone conversation with the sole-direct witness. During this time span the hearsay witness offered to rehire the Petitioner to, again, work on VAFB. (The Petitioner asserts that if the sole-direct witness did not perceive a threat or make a report to the Security Police it is illogical and unreasonable for any other person to state that a threat was made.)

C. UNAUTHORIZED POSSESSION OF VAFB ID PASSES--The Petitioner had resolved this issue prior to November 3, 1993, with the Pass & ID Section of the Security Police. However, the Investigator neglected to inquire with Pass & ID, or any other person, prior to issuing the pick up order. This prior resolution is confirmed by the audio-tape recording of the Petitioner's interrogation on November 15, 1993. New records created after the arrest do not mention this alleged offense. (Compliance with

existing investigative procedures would have prevented this alleged offense from being included on the pick up order.)

4. Although required by the Air Force's own regulations, civilian law enforcement was never contacted either before or after Petitioner's arrest. (Air Force Instruction 31-201, chap. 7, para. 7.1.2 states, "Since civilians are not normally subject to the UCMJ [Uniform Code of Military Justice], refer civilian violators to a US Magistrate for judicial disposition or to the local civil authorities having jurisdiction.") The Petitioner had no knowledge of any type of police controversy prior to his arrest on November 15, 1993. The Petitioner's normal reaction to his unexpected arrest was shock and anger. The Petitioner has never been provided with any written statement from the security police who were assigned to the security gate prior to Petitioner's arrest. Nor has any written evidence been received which contains a complaint by any person--except for the hearsay witness--about the Petitioner's conduct prior to his arrest.

A--The subsequent interrogation of Petitioner was, for the most part, tactful and was audio-tape recorded at the Petitioner's request. The Petitioner was released--without any charges ever being filed--after being in custody for 2 hours and 45 minutes and a consented search of the Petitioner's vehicle which was in the nonsecured area.

5. On November 16, 1993, unbeknownst to the Petitioner, statements were faxed to the Security Police by the General Foreman (the hearsay witness) and the Superintendent (the sole-direct witness). A pertinent part of a written statement by the Superintendent states: "During one of his [Petitioner's] phone calls to me he mentioned he

had contemplated getting a gun to take care of business but that that wouldn't be the right thing to do. I didn't think much more about it, but I did mention the conversation about the gun to my General Foreman." (Emphasis added.)

6. On July 5, 1994, the VAFB Judge Advocate mailed to the Petitioner an "insufficient evidence to warrant prosecution" letter. (At this time neither the Commander--nor any other person--considered the Petitioner to be a "security risk" or believed a barment order was necessary.)

7. In October of 1994, the Petitioner was issued an unrestricted, base-entry pass to work on South VAFB, an extremely-high-security area--the location where the alleged offenses occurred. (Again, indicating there was no security risk or need for a barment order.)

8. There was absolutely no law enforcement activity in relation to the Petitioner on VAFB between July 5, 1994, and December 30, 1994, when the Petitioner received a partial-barment order from VAFB. Nor was there any indication of any type of problem or complaint involving the Petitioner on VAFB. (In reference to the impropriety of nos. 6, 7, and 8, above and the "considered to be a threat to the maintenance of good order and discipline on this installation" within the partial-barment order, please refer back to page i, **QUESTIONS PRESENTED**, no. 4.)

9. The Petitioner was deprived of possible witness statements, despite several Freedom of Information Act Requests, until Petitioner "accidentally" received them from Defendant-Cook's-Welding in small claims court on December 8, 1994. The Petitioner had no prior knowledge

that the Air Force possessed any witness statements. (These statements are referred to in no. 5 above.)

10. On November 9, 1994, the Petitioner requested, within a letter (with U.S. Senator Dianne Feinstein as an intermediary), a 45 minute appointment with the Air Force Secretary who was scheduled to visit VAFB on January 9, 1995. The quoted purpose for the requested appointment was:

> "Currently, there is a raging controversy between the VAFB Security Police, the VAFB Judge Advocate's office, and me, Hobert Parker, Jr.
>
> The advantages:
>
> A-For You-An opportunity to correct a wrong and thereby reduce the effects of the afore-mentioned controversy and prevent damaging publicity and controversy and possibly prevent another "trouble" [a lawsuit] which You--like all people--could do with out.
>
> B-For me-Justice."

The request for an appointment was denied. During this time span the Petitioner had, also, made a reservation to attend a social function, featuring the Secretary, at the Officer's Club on VAFB to which the public was invited by a local newspaper article. The Petitioner asserts that the true cause for the barment order was an intention to prevent the Petitioner from talking with the Air Force Secretary.

11. On December 30, 1994, the VAFB Commander issued a barment order for the Petitioner. The order informed that the Petitioner was considered to be a threat to the maintenance of good order and discipline on the installation. The alleged crimes stated in the order were: **"your [Petitioner's] involvement in trespassing, nuisance telephone calls, verbal threats, and, disorderly conduct between 13 Oct and 11 Nov 93, while on Vandenberg AFB. Additionally, you are considered to be a threat to individuals who work on, or visit, the confines of Vandenberg AFB."** The order contained an exception which allowed the Petitioner, with limitations, to enter and work on South VAFB, an extremely-high-security area and the location where the stated offenses allegedly occurred.

A--This exception stimulates this proper question: Whether the exception belies and nullifies the Commander's assertion that the Petitioner's presence on VAFB was considered to be a threat to the maintenance of good order and discipline?

B- The basis for the barment order (and the investigative report) specifically states that the alleged offenses occurred **"between 13 Oct and 11 Nov 93"**. However, according to <u>other</u> Air Force official records the allegation of disorderly conduct allegedly occurred on November 15, 1993, when the Petitioner was arrested. The allegation of nuisance telephone calls, according to <u>other</u> Air Force official records, allegedly occurred after November 15, 1993.

12. On March 28, 1995, the Petitioner requested, in writing, that the VAFB Commander provide proof of the allegations in the barment order or that criminal prosecution of Petitioner be arranged. There was no response.

13. From the Air Force Legal Services Agency, the Petitioner received by "accident" part of an inter-office memorandum, dated 26 Jul 1995, which states, in pertinent part, "If claimant was represented by a competent attorney, I believe we would have some exposure as to a claim for false arrest/imprisonment. But if a wrongful detention was proved, I do not believe a judge would award more than the most nominal of damages, given the facts of this case." (See District Court Clerk Record no. 36, Exhibit 8, page 0136.)

14. After Petitioner made several unsuccessful administrative attempts to obtain proof of the barment order's allegations, he initiated litigation in District Court on August 28, 1996. The primary purpose was for a District Court order requiring the Air Force to provide proof of the accusations within the barment order or to retract them.

15. In all of the documents the Petitioner has submitted to the lower Courts, the Petitioner has never challenged the barment order, per se, or the Commander's authority to exclude persons from the Base; rather, the challenge has been to the truth of the allegations which were stated as the official basis for the barment order.

16. The Magistrate's Report and Recommendation (adopted by the District Court) in pertinent part states:

A--"Plaintiff seeks an evaluation of the truth of the facts underlying the allegations in the administrative record which is clearly beyond the permissible scope of review. This Court is limited to consideration of the question whether, assuming the allegations in the record are true, defendants' barment order based on those facts was patently arbitrary or discriminatory. Cafeteria Workers, id.[1] Review of the record makes it abundantly clear that the conduct attributed to plaintiff, if true, would justify a barment order in the interest of maintaining order, safety, and security on Vandenberg Air Force Base." (See Appendix C, page 13, lines 17-23 and page 14, lines 1-3.)

B--"Similarly, the commanding officer here was well within his broad discretion in deciding to bar plaintiff based on the evidence contained in the administrative record, even considering those facts which plaintiff concedes. Plaintiff admittedly engaged in at least some conduct which could reasonably be considered disorderly, harassing and threatening. Although explanations, excuses or extenuating circumstances may exist, it is clear that the commander's decision was not irrational, and there is no support for a finding that the decision was patently arbitrary or discriminatory. Accordingly, plaintiff's motion for summary judgment should be denied and defendants' motion should be granted." (Emphasis in original.)

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[1] Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898, 81 S.Ct. 1743, 6 L.Ed. 2d 1230 (1961).

C--In "A", above, the Magistrate's Report states that evaluation of the facts underlying the allegations in the administrative record "is clearly beyond the permissible scope of review." However, further in the paragraph there is mention that the record was reviewed--"review of the record makes it abundantly clear . . . ." Also, in "B", above, the Magistrate's Report does not specify what "some" admitted conduct there was "which could reasonably be considered disorderly, harassing and threatening." The Petitioner has not admitted any of the alleged offenses stated in his barment order which were the specific, official basis for the order. The truth of these alleged offenses are what the Petitioner has challenged in this litigation. (All other alleged offenses and/or those in the barment order and their respective dates that were not specifically and correctly stated in the barment order are not relevant and should not be considered by the Courts. Accusers have the moral and legal responsibility of being accurate when making accusations.) [Please refer back to page 9, no. 11 "B".]

D--Neither are there any explanations for, nor examples of, "Although explanations, excuses or extenuating circumstances may exist . . . ." (These facts should have been available for the scrutiny of the District Court and higher Courts.)

XIII

REASONS FOR GRANTING THE PETITION

1. "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest, for though due process generally implies and includes regular allegations, and a trial according to some settled course of judicial proceedings, that is not universally true." Const. Amend. 5; Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898, 81 S.Ct. 1743, 6 L.Ed. 2d 1230 (1961).

A--Petitioner asserts that "regular allegations" include the type of offenses alleged in the barment order that Petitioner was **"involved in trespassing, nuisance telephone calls, verbal threats, and, disorderly conduct between 13 Oct and 11 Nov 93, while on Vandenberg AFB. Additionally, you [Petitioner] are considered to be a threat to individuals who work on, or visit, the confines of Vandenberg AFB."**

B--Petitioner asserts that due process should be the right of any person who has been accused by a military commander of offenses that are "regular allegations" which are punishable by imprisonment if proved in a court of law.

2. "Consideration of what procedures due process may require under any given set of circumstances begins with a determination of precise nature of government function involved as well as private interests that have been affected by governmental action." Const. Amend 5; Id., Cafeteria Workers.

A--The Petitioner asserts that every person accused of punishable offenses, by a military commander within a barment order, has the private interest of the right to "be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction is a principle basic to our society." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951).

B--"But it [a barment order] ought not to affix a "badge of infamy," Wieman v. Updegraff, 344 U.S. 183 at page 191, 73 S.Ct. 215 (1952) at page 218, to a person without some statement of charges, and some opportunity to speak in reply."

C--According to Air Force Instruction 31-209, chap. 2, para. 2.8, "Barment orders should be in writing and contain sufficient details to support prosecution by civilian authorities." (The Petitioner was never prosecuted.)

D--"Administrative orders of commanding officers of military installations are not beyond reach of the courts and are not nonreviewable." Bridges v. Davis, 443 F. 2d 970, 973-974 (9th Cir. 1971).

E--"The military is an "agency" within the meaning of the Administrative Procedures Act," 5 U.S.C. Sections 700-706, Guerrero v. Stone, 970 F. 2d 626 (9th Cir. 1992). "The only exceptions of the APA applicable to the military are those for "military authority exercised in the field in time of war or in occupied territory" and "courts martial and military commissions." Guerrero at p. 628. "Military Records Board decisions are subject to judicial review" and "can be set aside if they are arbitrary or not based on substantial evidence." Id. at p. 628.

3. It is important for the Court to clarify whether the First Amendment protects speech that is not perceived as threatening by the sole-direct witness during a private telephone conversation.

A--**Threat**: "All that is necessary is that it be definite and understandable to a mind of ordinary intelligence." State v. Wilbourn, 219 Iowa 120, 257 N.W. 571. According to the Law the perception of the sole-direct witness is the primary, if not the only, determinant of whether a true threat was made. (The sole-direct witness, the job Superintendent, did not perceive a threat or initiate a complaint or report to the VAFB Security Police. The Air Force's response to Interrogatory no. 11 was that it has no information with which to respond to questioning about the perception of the sole-direct witness in relation to an alleged threat.)

B--"Governments need and have ample power to punish unreasonable acts. But it does not follow that they must have a further power to punish thought and speech as distinguished from acts." Wieman v. Updegraft, 344 U.S. 215, at page 220; 73 S. Ct. 215 (1952).

4. "State and federal governments, even in exercise of their internal operations, do not constitutionally have complete freedom of action enjoyed by private employers." Id., Cafeteria Workers.

A--The Petitioner has never challenged his barment order, per se, or the Commander's internal operations authority to exclude persons from the Base; rather, the challenge has been to the accuracy of the "regular allegations" officially stated within the barment order.

B--Despite this specific, repeated "non-challenge" in documents submitted to lower Courts, the Courts have not ordered the Air Force to furnish proof of the accusations or to retract them as requested in Petitioner's Complaint. The Petitioner respectfully asserts that if the Air Force has complied with 18 U.S.C., Section 1001 (prohibits false official statements) there is no valid cause for its continued refusal to provide proof of the allegations against the Petitioner or to retract them. Nor is there proper cause for the lower Courts to not order the Air Force to furnish proof of the allegations or to retract them.

5. It is important for the Supreme Court to issue a ruling as to whether the veracity of the accusations within a military barment order is, or can be, a separate and distinct Fifth Amendment issue WITHOUT a challenge to the barment order, per se, or the Commander's authority to exclude civilians from a military installation.

6. It is important for the Supreme Court to issue a ruling whether, and to what extent, any evidence derived from a false arrest can be the basis for accusations within a barment order.

7. Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 898, 81 S.Ct. 1743, 6 L.Ed. 2d 1230, (1961) is the primary and dominant Supreme Court decision in relation to military barment orders. The litigant therein was described as being, simply, a "security risk". It is important for the Supreme Court to issue a ruling to provide judicial guidance for the issuance of military barment orders where the facts are greatly different--e.g. this case-- from Cafeteria Workers and which will cause the standards of Cafeteria Workers to be judicially inapplicable and improper. (Cafeteria Workers allows a Commander to exclude persons from a military installation for all but patently arbitrary and

capricious causes. The APA only uses arbitrary and capricious.)

8. It is important for the Court to clarify whether the Fourth Amendment requires that military authorities:

A--Determine whether the sole-direct witness perceived a threat before alleging this offense within a pick up order.

B--Determine whether there is probable cause that trespassing has occurred before alleging this offense within a pick up order.

C--Provide, within a reasonable time, complaining-witness statements when requested by an arrestee.

9. United States Supreme Court Rule 10 (a): ". . . .or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power."

A--The Petitioner filed his District Court action under the Administrative Procedures Act, 5 U.S.C., Sections 700-706, which states that Courts have the duty to review agency administrative actions which must be based on facts or substantial evidence. There is a violation of 18 U.S.C., Section 1001 when official statements are made, ". . .or at least [made] with reckless disregard of truth and with conscious purpose to avoid learning truth." United States v. Evans, 559 F. 2d 244 (5th Cir. 1977) cert. den., 435 U.S. 945, 55 L. Ed. 2d 542, 98 S.Ct. 1528 (1978).

B--Despite these APA review requirements the District Court's ruling was: "Plaintiff seeks an evaluation of the facts underlying the allegations in the administrative record which

is clearly beyond the permissible scope of review. This Court is limited to consideration of the question whether, assuming the allegations in the record are true, defendants' barment order based on those facts was patently arbitrary or discriminatory. Id., Cafeteria Workers."

C--The Ninth Circuit Court of Appeals' Memorandum affirming the District Court decision stated in pertinent part, "the Air Force determined Parker trespassed on the Base and was guilty of disorderly and threatening conduct." However, on July 5, 1994, the Vandenberg AFB Judge Advocate sent the Petitioner an "insufficient evidence to warrant prosecution letter." This letter is part of the evidence the Petitioner has submitted to the lower Courts. This contradiction stimulates reasonable doubt as to whether all evidence had been adequately or properly considered by the Court of Appeals. Also, the Memorandum does not mention how or when "the Air Force determined Parker trespassed on the Base and was guilty of threatening and disorderly conduct." There was no due process whatsoever. (Every person is presumed innocent until proven guilty.)

XIV

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 15, 1999.

RESPECTFULLY SUBMITTED,

Hobert Parker, Jr.,
Petitioner, Pro Se